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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DALE EDWARD STEWART,

Defendant and Appellant.

B199508

(Los Angeles County  
Super. Ct. No. A081773)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Dale Edward Stewart appeals from the judgment entered after a jury found him guilty of two counts of forcible rape in concert (Pen. Code,<sup>1</sup> § 264.1; counts 1 & 2), forcible oral copulation in concert (§ 288a, subd. (d); count 3) two counts of robbery (§ 211; counts 4 & 5), first degree burglary (§ 459; count 6) and possession of a completed check with intent to defraud (§ 475, subd. (a); count 7) and also found true the allegation in counts 1 through 6 that a principal was armed with a firearm (§ 12022, subd. (a)). The trial court sentenced defendant to a total term of 26 years in state prison.

Defendant contends (1) the trial court erred prejudicially in denying his motion to dismiss based on due process and speedy trial grounds; (2) his conviction and sentence must be reversed because the trial court did not declare him competent to stand trial; and (3) his constitutional rights to due process were violated, and his consecutive sentences on counts 1 and 2 should be reversed, in that he was never charged with a violation of section 264.1 and thus lacked adequate notice of the charges. We conclude that these contentions lack merit and affirm the judgment.

## BACKGROUND

The crimes in this case were committed on or about December 5, 1980.<sup>2</sup> On December 24, 1980, following a two-day preliminary hearing, defendant was held to answer. On January 7, 1981, the People filed an information, charging defendant with the crimes for which he ultimately was convicted.<sup>3</sup> Defendant, who had posted bail, was

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise noted.

<sup>2</sup> An understanding of the facts underlying defendant's crimes is unnecessary for a resolution of the issues presented in this appeal. Accordingly, we need not and do not detail them.

<sup>3</sup> In counts 1 through 6, Edward Furbush was named as a co-defendant.

arraigned on January 19, 1981. Trial was set for February 24, 1981 but was continued on two occasions at defendant's request.

On April 21, 1981, the trial court reset defendant's bail at \$20,000 and remanded defendant to custody. At defendant's request, trial thereafter was continued numerous times.

On May 11, 1981, the trial court suspended criminal proceedings and initiated section 1368 proceedings. The court appointed Drs. John Stalberg and Alfred Coodley to examine defendant regarding his sanity and specified that their reports were due on June 1, 1981. The trial court also denied defendant's motion for reduction of bail.

On June 17, 1981, the trial court scheduled pretrial discovery for July 8, 1981 and trial for September 21, 1981. At the conclusion of the hearing, defendant was remanded to custody.

Sometime between June 17, 1981 and July 8, 1981, defendant posted bail. On July 8, defendant failed to appear. The court ordered his bail forfeited and issued a bench warrant for his arrest.

Defendant returned to court more than 24 years later on January 25, 2006, at which time the court recalled the bench warrant issued on July 8, 1981. Defendant made a motion to be released on his own recognizance. Not surprisingly, the court denied the motion.

On May 22, 2006, defendant filed a motion to dismiss, asserting that he had been denied his right to a speedy trial. Defendant argued that he had not been extradited to California until November 2005, that this delay was unreasonable despite his fugitive status, that his memory is impaired due to the passage of time and a life-threatening injury sustained eight years earlier, and that there is no adequate reason for the prosecution's delay in locating him. Defendant presented no evidence to substantiate his claim of memory impairment.

The People filed opposition, arguing that defendant had been a fugitive from the time he fled until he was extradited. The People provided a supporting declaration in which the following facts were set forth:

(1) In 1981, the Los Angeles Sheriff's Department, Fugitive Division, received information that defendant was staying with his mother in Natchez, Mississippi. On October 20, 1981, the Los Angeles District Attorney's Officer made an extradition request for defendant. Natchez police were unable to locate him, however.

(2) In January 2004, the Los Angeles Sheriff's Department, Fugitive Division, received information that defendant possibly was in Tavares, Florida, and sent a deputy to Florida in an attempt to locate defendant. On January 14, 2004, the Los Angeles District Attorney's Office made an extradition request for defendant's return.

(3) In October 2005, the Los Angeles Sheriff's Department received notice that defendant was in custody in Natchez, Mississippi on the warrant in this case. On October 24, the Los Angeles District Attorney's Office made an extradition request. Defendant refused to sign the extradition waiver. Following issuance of a governor's warrant, defendant was extradited to California.

The trial court held a hearing on defendant's motion to dismiss on October 3, 2006. The court noted that there was "no evidence" regarding the extent of defendant's memory loss. The trial court also considered the length of the delay, the reason for the delay, defendant's failure to assert his speedy trial rights and the prosecution's efforts to look for defendant, after which it denied the motion. Trial thereafter commenced.

## **DISCUSSION**

### **A. *Defendant was not deprived of his right to a speedy trial***

Defendant contends the delay between the time he fled and the time he was extradited and tried violated his rights to a speedy trial and due process. We disagree.

A criminal defendant has the right to a speedy trial under the federal and state constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Lowe* (2007) 40 Cal.4th 937, 942.) When determining whether a defendant's federal speedy trial right has been violated, courts must apply a balancing test. Specifically, the courts balance the (1) length of the delay, (2) reason for the delay, (3) defendant's assertion of his right and

(4) prejudice to defendant. (*Doggett v. United States* (1992) 505 U.S. 647, 651 [112 S.Ct. 2686, 120 L.Ed.2d 520]; *Barker v. Wingo* (1972) 407 U.S. 514, 530 [92 S.Ct. 2182, 33 L.Ed.2d 101]; *People v. Horning* (2004) 34 Cal.4th 871, 892.)

While the delay in this case unquestionably was lengthy, defendant himself was responsible for the delay. In 1980, defendant forfeited his bail by fleeing the state. Over the course of the next 24 years, the People diligently attempted to locate defendant, who at no time asserted his speedy trial rights. The People's first two attempts to extradite defendant from Mississippi and Florida in 1981 and 2004, respectively, were unsuccessful. When notified in 2005 that defendant was in custody in Mississippi on the warrant issued in this case, the People again sought to extradite defendant. He resisted extradition, however, and it was only after a governor's warrant issued that defendant returned to this state.

With regard to defendant's assertion that he was "severely prejudiced" as a result of "memory loss" he sustained when assaulted eight years earlier, the trial court aptly noted that "there is no evidence before me as to the extent of his memory loss or anything of that particular nature." In response, defense counsel represented that the records had been subpoenaed from Mississippi but had not yet been received.

Assuming for the sake of argument "that the passage of 24 years has resulted in self-prejudice from his ability to recall and recollect" and that "there was an attack which may have affected his recollection of the events in this particular case," the court nevertheless concluded, "I don't think that the reason for delay lies with the prosecution or the People in this matter, but with the defendant. So the speedy trial motion will be denied." We see no reason to disturb this determination under either the federal or state constitution. (*People v. Horning, supra*, 34 Cal.4th at pp. 892-895; *Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1539-1541.)

**B. *Defendant has failed to demonstrate that the trial court failed to resolve the issue of his competency***

Defendant contends his conviction and sentence must be reversed because the trial court did not declare him competent to stand trial. We are not convinced.

The record on appeal reveals that on May 11, 1981, the trial court declared a doubt as to defendant's sanity. It suspended criminal proceedings pursuant to section 1368, appointed two doctors to examine defendant, and directed the doctors to submit their reports to the court by June 1, 1981.

On June 17, 1981, the trial court scheduled pretrial discovery for July 8, 1981 and set trial for September 21, 1981. The court could not have done so unless it first determined that defendant was competent to stand trial and ordered the criminal proceedings to resume. (*Booth v. Superior Court* (1997) 57 Cal.App.4th 91, 100.) Absent evidence to the contrary, we presume, as we must, that sometime after May 11, 1981 and prior to June 17, 1981 the trial court regularly performed its official duty and determined that defendant was competent and ordered criminal proceedings to resume.<sup>4</sup> (Evid. Code, § 664 ["It is presumed that official duty has been regularly performed."].)

**C. *Defendant waived his claim that he lacked adequate notice that he was charged with rape in concert***

A person "accused of a crime must be 'informed of the nature and cause of the accusation.' (U.S. Const., Amend. VI.) 'It is fundamental that "When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and

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<sup>4</sup> We further note that defendant has failed to direct our attention to anything in the record remotely suggesting that the trial court had a reason to question his competence to stand trial following his extradition.

present his defense and not be taken by surprise by evidence offered at his trial.’ [Citation.]” [Citations.]’ [Citations.] ‘No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.’ [Citation.]” (*People v. Thomas* (1987) 43 Cal.3d 818, 823.)

Defendant contends his constitutional right to due process was violated and his consecutive sentences on counts 1 and 2 should be reversed, in that he was never charged with a violation of section 264.1 and thus lacked adequate notice that he was being charged with rape in concert. As we now explain, defendant has waived this contention.

In counts 1 and 2 of the information, the People charged defendant and co-defendant Furbush with forcible rape in violation of section 261, subdivisions 2 and 3. Although the information did not mention section 264.1 by number, it did allege that defendant and his co-defendant “voluntarily acted in concert with each other and with other persons by force and violence and against the will of the said victim, personally and by aiding and abetting each other.”

During a discussion of jury instructions, the trial court observed that the People had alleged that defendant committed the crime of rape in concert as it had been alleged against the defendant in *People v. Best* (1983) 143 Cal.App.3d 232—i.e., it alleged that the rape had been committed in concert without any mention of section 264.1.<sup>5</sup> Although the trial court accurately observed that the court in *Best* had concluded that rape in concert was a substantive offense, not an enhancement (*Best, supra*, at p. 236), the trial

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<sup>5</sup> As extant in 1980, the year defendant committed his offenses, section 264.1 provided: “The provisions of Section 264 notwithstanding, in any case in which defendant, voluntarily acting in concert with another person, by force or violence and against the will of the victim, committed the rape, either personally or by aiding and abetting such other person, such fact shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or if admitted by the defendant, defendant shall suffer confinement in the state prison for five, seven, or nine years.”

court deemed it appropriate to instruct the jury to find whether defendant committed the crime of forcible rape in violation of section 261 and then to determine whether he committed the rape in concert. The court expressly noted “because of the way the information is charged, everybody’s on notice that it’s an — it’s not an enhancement, it’s a substantive offense; that the actual offense charged in the language of the information is a 264.1 because of the allegation that they acted in concert.” Defendant did not object.

When the court later reviewed the packet of jury instructions, the parties had no objections. The court instructed the jury that in counts 1 and 2 defendant was charged with rape, in violation of section 261, and gave the elements of rape by force or violence. The court further instructed the jury that it was alleged in counts 1 and 2 that defendant acted in concert in committing the rapes, and it gave the jury the requirements for finding that defendant acted in concert.

The verdict forms for counts 1 and 2 asked the jury to determine whether defendant was guilt or not guilty of forcible rape in violation of section 261, subdivision 2. The forms then asked the jury to find true or not true the allegation that defendant acted in concert. Defendant did not object to these verdict forms.

A claim of lack of adequate notice of the charges is waived by the failure to object. (*People v. Gil* (1992) 3 Cal.App.4th 653, 659.) Here, defendant did not object when the trial court apprised the parties that “the actual offense charged in the language of the information is a 264.1.” Defendant did not object to the court’s jury instructions or to the jury’s verdict forms. As such, he has waived his claim on appeal.

In any event, the information more than adequately gave defendant notice that he was being charged with rape in concert. Like the information in *People v. Best, supra*, 143 Cal.App.3d 232, the information in this case alleged that defendant and his co-defendant committed forcible rape and that they acted in concert. This was sufficient to apprise defendant of the precise charge he faced in counts 1 and 2. That the information and jury verdicts did not specifically mention section 264.1 does not compel a contrary conclusion. (*People v. Thomas, supra*, 43 Cal.3d at p. 826; *People v. Hillard* (1989) 212 Cal.App.3d 780, 783; *Best, supra*, at pp. 237-238.)



The judgment is affirmed.

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JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.